No. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AND OTHER NATIONAL HOMELESSNESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The National Law Center on Homelessness & Poverty ("NLCHP") is a not-for-profit organization based in Washington, D.C., established to address issues related to homelessness and poverty at the national level. Poor and homeless people are frequently without effective political voice or power and any impediment to their ability to exercise their right to vote disproportionately affects them because the franchise is one of the few political mechanisms available to homeless individuals. NLCHP works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them.[1]

NLCHP advocates nationally to protect the constitutional rights of homeless individuals, including the fundamental right to vote. NLCHP has surveyed the photo identification requirements in every state, interviewed over 100 homeless service providers about the barriers that homeless people face when attempting to obtain such identification, and has published several related reports and manuals. NLCHP has extensive experience with federal constitutional questions affecting homeless people and believes the insights derived from its experience will assist this Court.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The National Alliance to End Homelessness (NAEH) is a non-profit organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to inform national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance. NAEH also supports efforts to ensure the constitutional rights, including voting rights, of homeless people are protected.

The National Coalition for the Homeless ("NCH") is a non-profit organization and membership network of local and statewide homeless coalitions committed to the goal of ending homelessness through systemic and attitudinal changes. NCH helped establish the National Homeless Civil Rights Organizing Project, which has published several reports on civil rights and voting rights of homeless persons.

The National Coalition for Homeless Veterans ("NCHV") is a non-profit founded in 1990 by a group of homeless veteran service providers. NCHV seeks to eliminate homelessness in the veteran community, by inviting individuals and all types of service providers to work in collaboration to develop innovative, comprehensive services that will allow homeless veterans to support themselves. NCHV shares the goal of protecting the voting rights of homeless people.

The National Health Care for the Homeless Council, Inc., is a membership organization comprised of 91 local service agencies, over 500 individual clinicians, and numerous homeless and formerly homeless persons. The National Council seeks to protect and promote voting rights of homeless persons.

The National Low Income Housing Coalition (NLIHC) is dedicated to ending America's affordable housing crisis. NLIHC focuses its advocacy on those with the most serious housing problems, the lowest income households. Further, a significant portion of NLIHC's work has included promoting voter participation among low-income and homeless individuals.

The National Policy and Advocacy Council on Homelessness ("NPACH") is a grassroots anti-poverty organization, whose mission is to ensure that national homelessness policy accurately reflects the needs and experiences of local communities. NPACH works to accomplish its mission through education, grassroots organizing, research, and technical assistance. NPACH supports efforts to protect homeless people's voting rights.

STATEMENT OF CASE

The Indiana law at issue significantly and unnecessarily burdens the voting rights of homeless persons. Obtaining a photo identification card under Indiana law requires documentation that is difficult, if not impossible, for many homeless individuals to provide. Most directly, in order to obtain the photo identification necessary to vote, the voter must present proof of a current address – which is impossible for unsheltered homeless people to provide. Ironically, an unsheltered homeless person may register to vote in Indiana without providing a specific street address; but, under this new law, a duly registered voter who lacks a current address could not obtain the photo identification card necessary to cast a regular ballot.

Instead, the Indiana law affords homeless persons who lack the requisite identification the sole option of

casting a provisional ballot, which is ignored unless the voter appears again at a different location to sign an attestation. The burdens created by this requirement to appear separately to sign a simple statement that could be executed at the polling place lack any connection to the State's putative interest in eliminating voter fraud. Although the record is devoid of any reason to believe that homeless persons are more likely than other voters to commit voting fraud, the Indiana provision burdens homeless voters with requirements that are particularly onerous for them.

A. The Status Of Homeless Persons Living In The United States

There are a significant number of people potentially affected by photo identification laws such as Indiana's. While it is difficult to determine with precision the number of homeless persons in the United States today, most estimates place the number of homeless people at between 500,000 and 750,000 persons. One large study estimated that the number of people who are homeless for some portion of the year can range from anywhere between 2.5 million and 3.5 million persons. See Office of Comty. Planning & Dev., U.S. Dep't of Hous. & Urban Dev., *The Annual Homeless Assessment Report to Congress* 7 (Feb. 2007) (hereinafter "*Annual Report*") (citing Martha R. Burt et al., *Helping America's Homeless: Emergency Shelters or Affordable Housing?* (2001)). Indeed, a 1990 study estimated that as many as 26 million people, 14 percent of the U.S. population in 1990, had experienced homelessness at some point in their lifetimes. *Id.* (citing B.G. Link et al., *Lifetime and Five-Year Prevalence of Homelessness in the United States* (1994)).

The homeless population is also demographically diverse. See *id.* at 21 (highlighting that the "data suggest that homelessness affects all genders, races, ethnicities, ages, and household types"). Thirty-four percent of homeless persons are in families with children. *Id.* at 29. Although estimates vary, perhaps as many as 44% of homeless persons have a full or part-time job. See Martha R. Burt et al., Interagency Council on the Homeless, *Homelessness: Programs and the People they Serve: Technical Report* 5-9 (Dec. 1999); *cf.* U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2006: A 23-City Survey* 48 (Dec. 2006) (hereinafter "*Status Report*"). Of the unaccompanied adults who are homeless, sixteen percent are women. *Annual Report*, at 29. Twenty-five percent of the sheltered homeless population are youth under the age of 17. See *id.* at iv. And, while all groups are affected by homelessness, minorities are disproportionately afflicted, comprising about 59% of the homeless population. See *id.* at 30. African Americans in particular experience homelessness in higher numbers than any other ethnic group, comprising approximately 45% of the homeless population. See *id.*

The living circumstances of homeless people also vary. Some are able to access emergency shelters, but the HUD Annual Report reviewed data from January 2005 and concluded that 45% of the national homeless population was *unsheltered*. *Id.* at 23. In Indiana, one recent report estimates that there are almost 10,000 homeless persons, approximately 3,000 of whom are unsheltered. *See* Nat'l Alliance to End Homelessness, *Homelessness Counts* 14 tbl.2 (Jan. 2007) (hereinafter "*Homelessness Counts*").

Consistent with these data, Congress has described homelessness as "an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families." See McKinney-Vento Homelessness Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987). Under the Act, "homeless persons" are defined as "individual[s] who lack[] a fixed, regular, and adequate nighttime residence" and whose "primary nighttime residence . . . is . . . a supervised publicly or privately operated shelter designed to provide temporary living accommodations" or "a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." 42 U.S.C. § 11302(a). Despite the important aid provided by this Act, many homeless people still do not receive even the most basic aid necessary to their survival. Indeed, the House of Representatives recently formally recognized the unabated national urgency to alleviate homelessness. See H.R. Res. 561, 110th Cong., 153 Cong. Rec. H8220 (2007) (enacted).

The causes of homelessness are complex, but the vast majority of homeless persons are living in public places involuntarily. Indeed, the most widely-accepted cause of homelessness is the lack of affordable housing, although several other factors frequently contribute to the circumstances that force people into homelessness. These include, in order of frequency, mental illness, substance abuse and lack of needed services, low paying jobs, domestic violence, prisoner reentry, unemployment, and poverty. U.S. Conference of Mayors, *Status Report*, at 4.

While these causes are complex, the impact of homelessness on the political life of these individuals is clear. Homeless persons have extremely limited access to the conventional mechanisms used to

persuade policymakers and interest groups. They have no party, no convention, no advertising, and no resources to organize and pressure their representatives for change. Accordingly, burdens on their franchise undermine one of the few opportunities they have to exercise some political influence.

B. Indiana's Statutory Requirements.

Under Indiana Code § 3-5-2-40.5 (the "Indiana voter identification law"), a person seeking to cast a vote in person is required to present valid photo identification issued by Indiana or the United States.[2] A person who fails to present a valid photo identification at the polling place may execute a provisional ballot. Ind. Code § 3-11-8-25.1(d). A provisional ballot, however, will not be counted unless the person who executed it appears before the Clerk of the Circuit Court or County Election Board within ten days of the election. *Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006). At that time, the person must either (i) present valid photo identification and execute an affidavit that the person is the same person who previously cast the provisional ballot, or (ii) execute an affidavit indicating that the voter who previously cast a provisional ballot is either "indigent and unable to obtain proof of identification without the payment of a fee" or has a religious objection to being photographed. Ind. Code § 3-11.7-5-2.5(c)(2).

Indiana purports to justify this requirement to appear at a second location and execute a separate

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[2] The sole exception to this photo identification requirement for in-person voters is if the person lives in a state licensed facility and votes in that facility. Individuals who vote by absentee ballot generally do not have to provide identification. *See* Ind. Code § 3-11-10-24

affidavit as necessary to eliminate voter fraud. Indiana, however, has never prosecuted anyone for misrepresenting their identity at a polling place. *See Indiana Democratic Party*, 458 F. Supp. 2d at 792 (S.D. Ind. 2006).

Like Indiana, six other states – Georgia, Florida, Hawaii, Louisiana, South Dakota, and Michigan (as of November 7, 2007) – all require in-person voters to present some form of photo identification. See Ga. Code Ann. § 21-2-417; Fla. Stat. § 101.043; Haw. Rev. Stat. § 11-136; La. Rev. Stat. Ann. § 18:562(A)(2); S.D. Codified Laws § 12-18-6.1; Mich. Comp. Laws § 168.523. Georgia and Florida, along with Indiana, also provide no method by which a person can cast a regular ballot without photo identification.[3] The remaining states all include some means – such as signing an affidavit at the polling place – that would allow a person without photo identification to cast a regular ballot.

C. Indiana's Photo Identification Requirements Create Barriers To Voting For Homeless Persons

Under Indiana law, many homeless persons face insurmountable obstacles to obtaining some form of valid photo identification. Although Indiana does not require a fee for its state voter identification card, Ind. Code § 9-24-16-10, an applicant must obtain a number of documents to obtain this "free" identification card. Specifically, an applicant must provide the Indiana Bureau of Motor Vehicles ("BMV") with a primary document, a secondary

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[3] A provisional ballot cast by a voter without identification in Florida will be counted if the county canvassing board determines the signature on the ballot matches the voter's registration form. Fla. Stat. § 101.048(2)(b).

document, and one proof of Indiana residency, or two primary documents and one proof of Indiana residency. 140 Ind. Admin. Code 7-4-3. These regulations present two independent barriers to voter participation by homeless individuals. First, the proof-of-residency requirement is one that many homeless persons cannot satisfy under even the most charitable interpretation of the regulations. Second, the documentation requirement is particularly financially and administratively burdensome to homeless persons who are the least able to bear it.

1. First and foremost, a person seeking an Indiana photo identification is always required to produce proof of residency. See *id.* Although Indiana authorities will accept a range of documents, such as a current utility bill, whatever document is used to satisfy the residency requirement must contain the applicant's name and current address. See *id.*[4] By definition, homeless persons, although part of particular communities, typically will not have the requisite traditional address.

This provision thus effectively requires that voters live in a traditional dwelling in order to obtain voter identification. While it theoretically may be possible for some homeless persons to use an Indiana shelter as their address,[5] in practice, shelter stay limitations make it very difficult for a person to use any given shelter as an address. Across the country, almost 75

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[4] P.O. boxes may not be used as proof of residency. *See* 140 Ind. Admin. Code 7-4-3.

[5] Homeless persons may be able to use a letter from a shelter as proof of residency and the shelter address as their address, although this option is not listed among the accepted documents in the State's regulations. *See* Indiana BMV, Driver License: Frequently Asked Questions, *at* http://www.in.gov/bmv/driverlicensefaq.htm (last viewed Nov. 7, 2007).

percent of "sheltered" homeless individuals rely on "emergency" shelters, which are intended to provide only short-term housing programs. *Annual Report*, at 46-47. Consequently, the length of stay is normally short; data evaluated by HUD in its Annual Report reflect that the median stay is only 31 days. See *id.* at 48 ex.5-4. And only about a quarter of sheltered homeless individuals stay more than 60 days at an emergency shelter. See *id.* Accordingly, even if a homeless person could use an emergency shelter as his current address, brief stays make it impractical for homeless persons to use any particular shelter's address for proof-of-residency.[6]

But many homeless people are not affiliated with shelters, and approximately 30 percent of homeless Indiana residents are unsheltered.[7] Indiana, like most other states, lacks enough temporary shelter to meet the needs of all of the State's homeless individuals. More generally, a survey of 57 communities in the United States found that not one had enough shelter space to meet demand. See Nat'l Coal. for the Homeless & Nat'l Law Ctr. on Homelessness & Poverty, *Illegal to be Homeless: The Criminalization of Homelessness in the U.S.* 13 (2002); see also *Homelessness Counts*, at 14 tbl.2 (noting estimates that 45% of homeless persons nationwide lack shelter). This need for shelter is

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[6] Shelters also often will not allow their addresses to be used because of the burden it puts on them to receive and hold people's mail.

[7] *See Homelessness Counts*, at 14 tbl.2. The shelter system, at times, can be financially out of reach for homeless persons. For example, some shelters charge fees, usually between $3 and $10, a price that can be prohibitively expensive for those seeking accommodations. *See* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale L. & Pol'y Rev. 1, 13 (1996).

desperate and getting worse. The 2006 report of the U.S. Conference of Mayors based on a 23-city survey estimated that requests for emergency shelter had increased by 9 percent since 2005, with 68 percent of cities reporting an increase. U.S. Conference of Mayors, *Status Report*, at 37. Any doubts as to the involuntary nature of homelessness are dispelled by the fact that, of the number of homeless people requesting emergency shelter in the surveyed cities, 23 percent of homeless people and 29 percent of homeless families were turned away. *Id.* at 59.

Individuals who are currently without shelter cannot meet the State's proof of residency requirements and, therefore, are completely barred from obtaining the requisite identification card and thus casting a valid vote under the Indiana law. Although Indiana's voter identification law contains an indigency exception, it contains no express provision that allows the exercise of the franchise by those who cannot meet the proof-of-residency or other documentation requirements in order to obtain the specified identification.

This voter *identification* requirement contrasts with Indiana's regime for voter *registration*. Under either the National Voter Registration Form or the Indiana Voter Registration Application, one is allowed to provide a map diagram in lieu of a residential street address. Instructions read simply "[i]f your residence has no address, street number or name . . . , please draw a map where your residence is located, include roads and landmarks." Indiana Election Comm'n, Indiana Voter Registration Application, State Form 50504 (R5/12-05). The voter photo identification requirements, however, lack a similar provision.

Consequently, Indiana's requirement that voters prove a "current address" to obtain identification imposes a substantial and unnecessary burden on both those homeless persons who are staying at emergency shelters as well as those who live their lives in public spaces. Those unsheltered individuals could identify a specific location within a political community to which they regularly return and to which they intend to remain for the present such that they could be deemed to have a residence. Indiana could craft an exception allowing such proof to suffice (as it does during voter registration), or provide a form affidavit for execution at the polling place (as do other states). Instead, the Indiana law contains no such provisions, and unnecessarily disenfranchises duly-registered individuals who lack a traditional dwelling or shelter.

2. Indiana's requirement that a photo identification applicant produce supporting documents such as other governmental photo identification, a birth certificate or United States passport imposes a substantial, independent burden on homeless persons. As the record below demonstrated, homeless persons are uniquely exposed to the financial and administrative burdens imposed by a voter photo identification requirement. See *Indiana Democratic Party*, 458 F. Supp. 2d. at 795 (discussing the burdens to obtaining photo identification for homeless people).

It is an obvious yet critical truth that persons without stable accommodations are uniquely ill-equipped to maintain possessions over an extended period of time as they are without a secure place in which to store them. These individuals must carry large amounts of personal property – including any identification documents they may possess. As such,

these items are daily exposed to loss or theft. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1555-56 (S.D. Fla. 1992) (documenting incidents of malicious destruction of the property of homeless persons). Nor can homeless persons avoid these problems by staying at a shelter because shelters often prohibit residents from leaving personal possessions at the shelter during the day. Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Report to Secretary on the Homeless and Emergency Shelters* 38 (1988).

Homeless persons faced with these difficult realities often are without the primary documents required by Indiana to obtain photo identification.[8] Thus, as a practical matter, a homeless individual will frequently need to obtain copies of one or more of the required primary documents to apply for the "free" Indiana photo identification.

Obtaining copies of the required primary documents, however, is financially and administratively daunting for a homeless person of limited means. Typically, an applicant must pay a fee in order to obtain the needed document. For example, obtaining a copy of an Indiana birth certificate costs approximately ten dollars.[9] Moreover, a person searching for a birth certificate also would potentially need substantial funds in order to travel to and from

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[8] The primary documents accepted by the State include a United States birth certificate, a United States passport, United States documents showing that the person is a citizen born abroad, a United States military, veterans or merchant marine card with a photograph, a United States veteran's universal access identification card with photograph, or an Indiana driver's license or learner/driver education permit. 140 Ind. Admin. Code 7-4-3.

[9] Costs can vary by County. *See* Indiana State Department of Health website, *at* http://www.in.gov/isdh/bdcertifs/bdcert.html.

the place where the birth certificate is located, which may not even be in the same State as the person's current residence.

For homeless persons born in Indiana, the regulations can render it administratively *impossible* to obtain voter identification because, in some counties, a person is required to produce photo identification in order to obtain a birth certificate.[10] Under this "Catch-22" scenario, a person cannot get photo identification without a birth certificate, but cannot obtain a birth certificate without photo identification.[11]

D. The Provisional Ballot Burdens The Voting Rights Of Homeless People.

Without any valid photo identification, an individual attempting to cast an in-person vote may execute only a provisional ballot. Ind. Code § 3-11-8-25.1(d). The provisional ballot, however, imposes additional, unnecessary burdens upon homeless individuals. Under Indiana law, any person who executes a provisional ballot must return in person before either the Clerk of the Circuit Court or County Election Board within ten days of the election. See

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[10] *See, e.g.*, Tippecanoe County Health Dep't. Birth/Death Certificates (2007), *at* http://www.tippecanoe.in.gov/health/division.asp?fDD=15-42 ("To receive a copy of a certified birth certificate you must have your ID such as driver's license or State ID.").

[11] Gathering such documents is also particularly burdensome because it can entail going to multiple locations to obtain multiple forms of documentation. Accounting for the circumstances homeless persons must often navigate – e.g., traveling with all of one's possessions without access to a personal vehicle while often struggling for food and shelter – what would be merely an annoyance for others becomes an all but insurmountable obstacle for those without means or a fixed residence.

Ind. Code § 3-11.7-5-2.5; *Indiana Democratic Party*, 458 F. Supp. 2d at 786.

Any specific rationale for forcing the person to appear at a different location at a later time, and its connection to the suppression of voter fraud, is not present in the record. What is clear is that the requirement that homeless persons without photo identification return to a separate location at a separate time and date imposes gratuitous burdens of travel, time and expense on those persons least likely to be able to bear them.

Assuming that a homeless person can manage to arrive at the appointed office, the individual must then either present a valid photo identification – the absence of which likely constitutes the reason the person was unable to vote a regular ballot in the first instance – or attest that he or she is "indigent and unable to obtain proof of identification without the payment of a fee." Ind. Code § 3-11.7-5-2.5(c)(2). Again, nothing in the record makes clear any reason that this attestation could not take place at the polling place.

This "indigency exception," moreover, requires what is literally a false attestation. Given that Indiana photo identification cards are *free*, it is unclear that a person without photo identification in Indiana could ever attest that he is "unable to obtain proof of identification without the payment of a fee." To be sure, gathering the needed supporting documents certainly will impose significant costs on homeless individuals, but there is no indication in the record that the State will consider this fact to constitute a "payment of a fee" under the Act. *Id.* The Indiana law is thus crucially and impermissibly vague regarding whether this exemption for indigent persons could ever be fulfilled (unless the Court is

willing to indulge the assumption that the State will effectively soften the literal wording of the statute through regulation). Consequently, under the Indiana law, a homeless person without the means to obtain photo identification might never be able to convert a provisional ballot into a regular ballot.

SUMMARY OF ARGUMENT

As James Madison made clear long ago, the franchise was intended to extend "[n]ot [to] the rich more than poor" because "[t]he electors are to be the great body of the people of the United States." *The Federalist No. 57* (J. Madison) (defending the House of Representatives). The Constitution recognizes state legislative power to control the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. But this Court also has long recognized that, under our Constitution, "the political franchise of voting [is] a fundamental political right[] because [it is] preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966). Accordingly, this Court reviews for rationality regulations over the voting process that are "reasonable [and] non-discriminatory," but applies more searching scrutiny to those regulations that unreasonably restrict access to the ballot. *Anderson* v. *Celebrezze*, 406 U.S. 780, 788 (1983).

The Indiana photo identification law unreasonably and unnecessarily harms homeless individuals. Although one may register to vote without a street address, the Indiana identification law effectively mandates that only persons who can provide the specified proof of current address and other documentation required for government-issued identification may cast a regular ballot. Many homeless persons cannot provide the specified proof

of current address. Nor can many homeless persons afford the further documentation Indiana requires to obtain "free" photo identification. The court of appeals erred by ignoring these significant and inevitable practical burdens imposed by the Indiana voter identification law.

The "indigency exception" in the Indiana law does not remotely cure these defects. No persuasive reason supports requiring a person to travel to another location for the sole purpose of declaring his poverty. And such a declaration of an inability to afford the Indiana photo identification card – while arguably false given that the cards themselves are "free" – fails to address the inability to obtain valid photo identification because homeless persons lack a current address or other necessary documentation.

Through these requirements, Indiana imposes a substantial and unnecessary burden on the fundamental right to vote and effectively disenfranchises an entire group of eligible voters. These requirements are unreasonably burdensome and weigh heavily upon homeless persons, requiring this Court to engage in a searching review of its purported rationality. See *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992).

Indiana's interest in preventing voter fraud is not served by forcing homeless people to travel to a different location to sign a literally false attestation. Indeed, the record is devoid of any evidence that accommodating the burdens on homeless people would inhibit the State's desire to combat perceived voter fraud. Likewise, the underlying requirement for the photo identification – that one have proof of a current address – imposes on some significant number of homeless individuals an insuperable

barrier to their right to cast a vote that will be counted.

Under the appropriately searching analysis, the State's proffered interest in maintaining a statute that severely affects a population's fundamental interest must be examined in the specific context of those affected groups so that the Court is "scrutiniz[ing] the asserted harm of granting specific exemptions." See *Gonzales* v. *O Centro Espirita*, 546 U.S. 418, 431 (2006); see also *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003). There is no permissible reason to deny homeless persons practical accommodations such as signing an affidavit at the polling site – a requirement which could protect both the franchise of homeless persons and the integrity of the ballot.

Indiana's effort to tie the franchise to the possession of photo identification senselessly increases the burdens of homelessness and denies homeless people their full measure of political expression in our political community. This Court has repeatedly held that ballot access may not be dependent on voter affluence, see, *e.g.*, *Harper*, 383 U.S. at 668, and lower courts have recognized that homeless people should not face additional hurdles to vote solely because they are impoverished and live in unconventional places. *Collier* v. *Menzel*, 176 Cal. App. 3d 24 (1985); *Pitts* v. *Black*, 608 F. Supp. 696 (S.D.N.Y. 1984).

The perspective of homeless people during the electoral process is especially significant given that the justice of a law is best measured by its impact on those least able to speak for themselves in the normal political processes. The Constitution has always "forbid[den] 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds* v. *Sims*, 377 U.S.

533, 563 (1964). Whether intentionally or thoughtlessly, the Indiana law needlessly diminishes the ability of homeless people to exercise their franchise and is therefore invalid.

ARGUMENT

THE INDIANA LAW UNREASONABLY AND UNNECESSARILY BURDENS THE RIGHT OF HOMELESS PERSONS TO VOTE.

A. Severe Restrictions On The Franchise Merit Particularly Searching Review.

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); see also *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized.").

In recognition of the fundamental role that voting plays in our Republic, only "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls" are permissible. *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992) (allowing a prohibition on write-in candidates in light of an open filing scheme for ballot access); see also *Anderson* v. *Celebrezze*, 460 U.S. 780, 806 (1983) (striking down unreasonable filing deadlines for independent candidates). This Court's decisions in *Anderson* and *Burdick* acknowledge the State's power

to choose its own reasonable management methods while also guarding the fundamental right to vote.

State election laws that severely burden the right to participate in elections have thus consistently been held to merit the most searching judicial review. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005) ("[S]trict scrutiny is appropriate . . . if the burden is severe."); *Norman* v. *Reed*, 502 U.S. 279, 289 (1992) ("[W]e have . . . required any severe restriction to be narrowly drawn to advance a state interest of compelling importance."); *Cipriano* v. *City of Houma*, 395 U.S. 701, 704 (1969) (per curiam). In assessing the proper level of scrutiny, this Court weighs

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 780); see also *id.* at 445-46 (Kennedy, J., dissenting) (agreeing with this formulation).

This Court has thus applied a measured, elastic scrutiny which depends largely upon the gravity of the burden to the franchise. "[T]he rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which [the] challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Accordingly, if a law creates a "reasonable and non-discriminatory" regulation over the voting process, the law need only be justified by a rational basis. *Anderson*, 460 U.S. at 788. But if

ballot access regulations impose "severe restrictions" affecting the eligibility of citizens to participate in the election process, *Burdick* requires that those regulations must be "'narrowly drawn to advance a state interest of compelling importance.'" 504 U.S. at 434.

B. The Indiana Law Imposes Severe Burdens On Homeless Persons' Franchise.

The Indiana photo identification requirement erects severe barriers to voting for indigent persons generally and homeless persons in particular. Because these regulations effectively disenfranchise one class of voters, they are constitutionally invalid unless they are necessary to promote a compelling state interest. See *id.* As Circuit Judge Wood noted, "To the extent that [the Indiana law] operates to turn [eligible voters] away from the polls, it is just as insidious as the poll taxes and literacy tests that were repudiated long ago." *Crawford* v. *Marion County Election Bd.*, 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from the denial of rehearing en banc).[12]

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[12] This balance also reflects human rights norms given that voter registration laws that deny homeless voters the right to vote also violate the human rights standards with which the U.S. has agreed to abide under the International Covenant on Civil and Political Rights (ICCPR), as ratified on June 8, 1992. *See* U.S. Const. art. VI, cl. 2. Article 25 of the ICCPR specifically recognizes the right to vote without distinctions of status or "unreasonable restrictions". *International Covenant of Civil and Political Rights*, art. XXV, Mar. 23, 1976. The U.N. Human Rights Committee, which monitors implementation of the ICCPR, has specifically noted:

> States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be

The first and most significant barrier a homeless person faces when attempting to obtain photo identification is the requirement that the applicant provide proof of his current address. Ironically, such proof of current address is not a requirement to register to vote, but the new law creates this requirement in order actually to cast a regular ballot. Unless circumstances somehow allow a shelter or other address to be used, this requirement places a substantial and unnecessary burden on the franchise of homeless individuals. The photo identification requirement, as a practical matter, limits those eligible to cast a regular ballot to those individuals with a current address. Thereby, it deprives homeless individuals of one of the few activities that they still may do just like anyone else: vote.

In addition to the proof of current residential address requirement, a homeless person also is saddled with the burden of obtaining the identification itself, which includes the relatively significant costs of obtaining necessary supporting documents, such as a passport or birth certificate. And the administrative requirements for such documents may often prove to be insurmountable for a person of little or no means who lacks the photo identification that is often necessary to obtain the documents, such as birth certificates, which are in turn necessary to obtain the requisite photo identification. At bottom, the practical consequences of these financial and administrative hurdles on

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imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.

U.N. Human Rights Comm., *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25)*, CCPR/C/21/Rev.1/Add.7 ¶ 11 (Dec. 7, 1996).

homeless persons significantly burden their franchise.[13]

Indiana's law likewise denies a coherent alternative to those who have cast a provisional ballot but are unable to obtain photo identification. The provisional ballot option requires the voter to return to a separate office and thereby creates senseless financial and administrative costs that other members of the community can avoid. Consequently, a person unable to obtain identification would be exceptionally unlikely to be able to convert a provisional vote into a counted ballot.

C. The State Has No Compelling Interest In Burdening The Vote Of Homeless People.

Indiana's amorphous interest in preventing voter fraud cannot satisfy the specific inquiry mandated for substantial burdens to the fundamental right to vote.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell* v. *Gonzales*, 127 S. Ct. 5, 7 (2006) (per curiam). But the analysis of the burdens of a particular law cannot proceed at such a level of abstraction. Rather, a "compelling interest test is satisfied through application of the challenged law 'to the person.'" *Gonzales* v. *O Centro Espirita*, 546 U.S. 418, 430 (2006). Searching judicial inquiry requires the Court to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize

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[13] Robert Andrew Ford and Brenda Thompson, caseworkers at a day center for homeless persons in Indianapolis, provided specific testimony on the "severe" hardships this law will impose on homeless persons, particularly in obtaining and retaining documents and transportation. *See* J.A. 10-19.

the asserted harm of granting specific exemptions." *Id.* at 431. This context-specific inquiry must indeed be "sensitive to the facts of each particular claim." *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in judgment); see also *O Centro Espirita*, 546 U.S. at 431-32 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003) & *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 228 (1995)).

In its putative effort to ensure the integrity of elections, Indiana has enacted a law that uses a hammer to attack a fly. There is no evidence that homeless individuals commit voting fraud and thus no reason exists to force them to leap through hoops to protect electoral integrity. Moreover, the State has made no apparent effort to document the scope or even the occurrence of the problem these laws were fashioned to prevent. Indeed, on this record, Indiana has conceded that it has never had occasion to prosecute a voter for using false identification. *Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d. 775, 792 (S.D. Ind. 2006). Indiana has not claimed, much less offered any evidence, that imposition of a photo identification requirement on in-person voting would in any way curtail feared election fraud.

To the contrary, Indiana itself makes provisions for voters to register without a traditional residence, yet absurdly refuses similar accommodations in its identification requirements. Indeed, most states provide accommodations to homeless people that allow them both to register and cast regular ballots, without any evidence of endangering the integrity of their elections. See Nat'l Law Ctr. on Homelessness & Poverty, *Voter Registration and Voting: Ensuring the Voting Rights of Homeless Persons* A2-37 (2004). While it is true that homeless individuals are without

a traditional dwelling and are often impoverished, imposition of a photo identification requirement is invalid unless the State can show that the absence of such a requirement threatens its legitimate interests. Absent such an articulated interest, Indiana's photo identification requirement has no compelling reasons supporting it and is constitutionally suspect.

D. The Indiana Voting Law Is Not Tailored To Further The State's Purported Interest.

The irrationality of the burdens that the Indiana law imposes on homeless voters provides a particularly telling demonstration of the law's invalidity.

The Indiana Law is no mere economic regulation or simple registration requirement. Accordingly, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Anderson*, 460 U.S. at 806 (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963)). Indeed, lower courts have already directly struck down similar statutory requirements that voters have a traditional dwelling. See *Pitts* v. *Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); see also *Collier* v. *Menzel*, 176 Cal. App. 3d 24 (1985).

> A citizen who is a qualified voter is no more or less so because he or she lives in an unconventional place. . . . Denying the opportunity to vote to a resident merely because he or she cannot afford housing denies a citizen's vote on the basis of economic status and is therefore an impermissible basis for determining the entitlement to vote.

Collier, 176 Cal. App. 3d at 37.

Voter identification requirements potentially address only one, rare form of dishonesty: that of voter impersonation (which is a highly inefficient mode of influencing elections). Such laws have no effect on the integrity of electronic voting machines, dishonesty during vote tabulation, fraud during absentee voting, or voter intimidation and confusion.[14] These are the real sources of risks to the electoral process.

Even assuming this Court were to accept Indiana's provision as an incremental (if trivial) effort to curtail certain voter fraud, there is no rationality to be found in insisting on certain forms of photo identification at the time of voting as a means of addressing bureaucratic failures to maintain accurate rolls at the time of registration.[15] Restrictive voter identification laws are indeed a poor solution in search of a problem. Indiana law already contains a provision that can resolve actual doubts about a voter's identity without the new, onerous identification requirements challenged here.[16] No reasonable rationale supports

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[14] The Indiana law is also significantly under-inclusive in that it applies only to in-person voters but not individuals who vote by absentee ballot. By doing so, Indiana has left itself exposed to voter fraud activities by those voting through absentee ballot. There is little reason to believe that fraudulent activities – if they actually occur – are restricted to in-person voting.

[15] Respondents cite inflated voter registration rolls as the problem voter identification requirements are meant to address. J.A. 184, but Indiana does not require photo identification to register and requiring photo identification on the day of the election does nothing to clean the rolls.

[16] Ind. Code § 3-11-8-25.1(d) provides:

> In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under IC 3-7-29. If the board determines that the voter's signature is authentic, the voter

Indiana's insistence on this further, restrictive identification scheme when the practical result will be effectively to disenfranchise nearly politically powerless citizens.

The Indiana law also offers no reasonable alternative avenue to access the ballot box for those who do not have photo identification. Indeed, the provisional ballot option offered by Indiana is just as cumbersome as the photo identification requirement. It is absurd to require a homeless person to cast a provisional ballot and then travel to a different location in order to attest that they lack photo identification. No rationality supports the requirement of this second trip to a different location, much less the justification for not providing the necessary affidavit at the election site.

Other methods to achieve the same goals are certainly feasible. For example, Virginia accommodates voters who do not have a current identification by allowing that "if a voter is entitled to vote except that he is unable to present one of the forms of identification listed above, he shall be allowed to vote after signing a statement, subject to felony penalties for false statements pursuant to §24.2-1016, that he is the named registered voter who he claims to be." Va. Code Ann. §24.2-643. A pad of form affidavits is all that is required.

Indiana has failed to explain why its restrictive policy is necessary in light of such obvious alternatives or how it has attempted to tailor its law narrowly towards its purported goal of preventing

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may then vote. If either poll clerk doubts the voter's identity following comparison of the signatures, the poll clerk shall challenge the voter in the manner prescribed by section 21 of this chapter.

election fraud. Indeed, the analysis of these effects must "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson*, 460 U.S. at 806 (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973)). In failing to ensure meaningful, alternative access to the ballot box for duly-registered but homeless voters, the Indiana law is shown not to be narrowly tailored toward its purported end and, consequently, should be invalidated.

* * * *

At the end of the day, affluence must remain a "capricious or irrelevant factor" to the franchise. *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). The Indiana law significantly harms the ability of the poorest of its citizens both to cast regular ballots and to have their provisional ballots counted, and it does so in the service of a state interest that can only generously be described as speculative. The injury to most homeless individuals' First and Fourteenth Amendment rights, however, is tangible and insurmountable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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